No. 16-1454

In The Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC., CENTER FOR RESPONSIBLE LENDING, CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER AND PUBLIC CITIZEN, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae are leading not-for-profit consumer advocacy organizations, with broad knowledge about consumers' use of credit cards. *Amici* are particularly well qualified to assist the Court in understanding how the public interest, and consumer interests in particular, are undermined by anticompetitive restraints against merchants, such as the restraints at issue here.[1]

United States Public Interest Research Group Education Fund, Inc. ("U.S. PIRG Education Fund") is a 501(c)(3) independent, non-partisan organization that works on behalf of consumers and the public interest. Through research, public education, and outreach, it serves as a counterweight to the influence of powerful special interests that threaten the public's health, safety, or well-being. U.S. PIRG Education Fund participates as *amicus curiae* in cases that will have a substantial impact on consumers and the public interest, such as this one. U.S. PIRG Education Fund has long advocated on the issue of swipe fee reform, believes that cash customers should not pay more to subsidize credit card reward programs, and supports

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[1] Counsel for *amici* files this brief with consent of the parties, whose blanket consents are on file with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

efforts to make the costs of credit transparent to consumers.

The Center for Responsible Lending ("CRL") is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive practices in the market for consumer financial services and to ensuring that consumers may benefit from the full range of consumer protection laws designed to inhibit unfair and deceptive practices by banks and other financial services providers. CRL is an affiliate of Self-Help, one of the nation's largest non-profit community development financial institutions. Since 1980, Self-Help has provided over $7 billion in financing to 131,000 families, individuals and businesses underserved by traditional financial institutions. Through its credit union network, Self-Help's two credit unions serve over 130,000 people in North Carolina, California, Chicago, Florida and Wisconsin and offers a full range of financial products and services. Additionally, CRL issues research and policy reports on a variety of financial products, including credit cards. CRL has broad knowledge of the credit card market and is well situated to assist the court in understanding the impact of merchant restraints on the cost of consumer credit.

Consumer Federation of America ("CFA") is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 300 of these groups participate in the federation and govern it through their representatives on

the organization's Board of Directors. As a research organization, CFA investigates consumer issues, behavior, and attitudes through surveys, focus groups, investigative reports, economic analysis, and policy analysis. The findings of such research are published in reports that assist consumer advocates and policymakers as well as individual consumers. As an advocacy organization, CFA works to advance pro-consumer policies on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. As an education organization, CFA disseminates information on consumer issues to the public and news media, as well as to policymakers and other public interest advocates. Since it was formed, ensuring a fair financial marketplace has been a top priority for CFA.

Consumers Union is the policy and mobilization division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. It conducts its policy work in the areas of antitrust and competition policy and financial reform, as well as food and product safety, privacy and data security, telecommunications reform, health care reform, and other areas. Consumer Reports is the world's largest independent product-testing organization. Using its dozens of labs, auto test center, and survey research department, the non-profit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine,

website, and other publications. Consumers Union has been actively engaged against the harms caused by anticompetitive credit card practices for many years.

National Association of Consumer Advocates ("NACA") is a non-profit corporation formed in 1994 whose members are lawyers, law professors, and students whose practice or area of study involves consumer protection. NACA's mission is to promote justice for consumers by maintaining a forum for information-sharing among consumer advocates and to serve as a voice for its members and consumers in the struggle to curb unfair and oppressive business practices.

National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low-income and elderly consumers. Since its founding in 1969, NCLC has been a resource center addressing consumer finance issues affecting equal access to fair credit in the marketplace. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series and has served on the Federal Reserve System Consumer-Industry Advisory Committee, as the Federal Trade Commission's designated consumer representative, and on committees of the National Conference of Commissioners on Uniform State Laws.

Public Citizen, Inc. is a non-profit consumer advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, courts, and state governments on a wide range of issues. Public Citizen works for enactment

and enforcement of laws to protect consumers, workers, and the public and to foster open and fair governmental processes. Public Citizen believes that vigorous enforcement of antitrust laws is critical to protecting consumers against collusive corporate practices that increase prices and diminish consumer choice. Public Citizen and its attorneys have joined in or represented parties to *amicus curiae* briefs in many cases in this Court and others involving antitrust claims. *See, e.g.*, *N.C. Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Delta Airlines v. Siegel*, No. 16-16401 (11th Cir. appeal pending).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns virtually every dollar that Americans spend on consumer goods and services. The contractual provisions at issue require that the overwhelming majority of the 6.4 million businesses that accept American Express ("Amex") credit cards must not promote any other payment method above Amex cards, imply any preference for other payment methods, or attempt to dissuade anyone from using an Amex card.[2] The restrictions Amex imposes on the sprawling network of merchants who accept its cards

[2] *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 162 (E.D.N.Y. 2015) ("*Amex I*"), *rev'd and remanded*, *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016), *cert. granted*, *Ohio v. Am. Express Co.*, No. 16-1454, 2017 WL 2444673 (Oct. 16, 2017).

are inextricably linked to every consumer transaction – regardless of whether consumers choose to pay with an Amex card, another credit card, a debit card, another form of electronic payment, or cash.

After a seven-week trial, the district court issued a 150-page order holding that Amex's merchant restraints suppress horizontal competition in violation of the Sherman Act. Specifically, the district court held that Amex's merchant restraints have rendered "[p]rice competition . . . a critical avenue of horizontal interbrand competition . . . near[ly] irrelevan[t]."[3] The district court's opinion comports with this Court's repeated admonition that preserving horizontal competition is the principal objective of the antitrust laws.[4] The district court's injunction against Amex's merchant restraints had the potential to restore competition to a market where it has long been in short supply. The Second Circuit nonetheless reversed the district court and ordered judgment in Amex's favor.[5]

The Second Circuit's decision reflects a fundamentally erroneous view of the effects of Amex's merchant restraints. First, the restrictions Amex imposes on its merchant customers stifle price competition to the

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[3] *Amex I*, 88 F. Supp. 3d at 209.

[4] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 878 (2007); *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988).

[5] *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016) ("*Amex II*"), *cert. granted*, *Ohio v. Am. Express Co.*, No. 16-1454, 2017 WL 2444673 (Oct. 16, 2017).

detriment of consumers.[6] Second, the Second Circuit's opinion improperly contradicts the district court's factual findings without determining that they were clearly erroneous. Without this Court's intervention, the Second Circuit's decision could be invoked across a range of industries to shelter anticompetitive conduct from appropriate scrutiny under the antitrust laws.

ARGUMENT

I. Merchant Restraints Suppress Price Competition And Harm Consumers.

Most adult Americans hold at least one credit card, and the average consumer holds nearly four such cards.[7] In 2015, there were approximately $3.16 trillion in credit card purchases in the United States, representing nearly 34 billion credit card transactions.[8] In September 2017, Americans collectively held over one trillion dollars in revolving credit card debt, approaching the previous record sum of $1.02 trillion, recorded

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[6] Although the relevant market for *antitrust purposes* is the merchant services market, *see* Pet'rs Br. 11, the point remains that a reduction in competition in the merchant services market results in harm to consumers *on top of* – and *as a result of* – supra-competitive merchant prices.

[7] Consumer Financial Protection Bureau, *The Consumer Credit Card Market* 11 (2015), *available at* http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf.

[8] The Federal Reserve, *The Federal Reserve Payments Study 2016* (2016), *available at* https://www.federalreserve.gov/newsevents/press/other/2016-payments-study-20161222.pdf.

in April 2008.[9] The number of credit card transactions in the U.S. grew at an annual rate of 8.0 percent from 2012 to 2015.[10] Simply put, credit cards are vitally important in the economic lives of American consumers.

Merchants incur a fee each time a consumer chooses to pay with a credit card. Since consumers make this choice tens of billions of times a year, the fees add up. In 2016 alone, U.S. merchants paid $88.39 billion in fees to credit card companies.[11] Many merchants that accept Amex cards sustain fees in excess of 3 percent of the amount of each credit transaction. Given that the average general retailer in the U.S. operates with a 2.60 percent net margin,[12] merchant fees are a highly significant feature of the consumer retail market.

Other credit cards carry markedly lower merchant fees. Yet merchants are contractually barred from educating consumers about the actual cost of using particular credit cards – and are barred from so much as *mentioning* Amex's high merchant fees – at the point

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[9] *See* The Federal Reserve, *Consumer Credit Outstanding (Levels)* (Nov. 7, 2017), *available at* https://www.federalreserve.gov/releases/g19/hist/cc_hist_sa_levels.html.

[10] Federal Reserve Payments Study, *supra* note 8.

[11] *See U.S. Merchants Paid $88.39 Billion in Card Fees in 2016*, Nilson Rep. (May 2017), *available at* http://www.prweb.com/releases/prweb14347691.htm.

[12] *See* NYU Stern School of Business, *Margins by Sector* (Jan. 2017), *available at* http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html.

of sale.[13] Merchants are likewise restricted by Amex's rules from setting different prices based on whether consumers pay with an Amex card or another credit card.[14] These restraints inoculate Amex against price competition from other credit card companies. Amex admitted as much at trial.[15]

Absent price competition, Amex's competitors do not benefit from maintaining relatively low merchant fees. As a result, when Amex raises its fees, other credit card companies tend to follow suit.[16] The district court found that Amex has been able to impose a steady succession of fee increases on merchants without fear of significant merchant attrition.[17] The result is artificially elevated and ever-escalating credit card costs for merchants, which in turn drives up prices for consumers.[18]

The harm to consumers from supra-competitive prices is not theoretical.[19] For example, a major U.S. airline testified that its credit card fee costs were *twice* as much as its domestic labor costs.[20] And though Amex

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[13] *Amex I*, 88 F. Supp. 3d at 162.

[14] *Id.*

[15] *See* Trial Transcript ("Tr.") 2596:2-2597:5, 2668:23-2669:3.

[16] *Amex I*, 88 F. Supp. 3d at 216-17.

[17] Tr. 244, 569-70, 1608-09, 2407-10, 2414-15.

[18] Zhu Wang, Federal Reserve Bank of Kansas City, *Market Structure and Credit Card Pricing: What Drives the Interchange?* 7 (2007), *available at* http://www.frbatlanta.org/news/CONFEREN/08payments/08payments_Wang.pdf.

[19] *Amex I*, 88 F. Supp. 3d at 216-24.

[20] Tr. 2440:23-2441:3.

customers receive cardholder rewards which may compensate *them* for higher retail prices – to some extent – the overwhelming majority of consumers – those who use cash, debit cards, other less expensive credit cards, or electronic benefit cards – face higher prices without any reciprocal benefit.[21]

These other consumers effectively subsidize Amex cardholder benefits and Amex profits. In an analysis focused on gasoline and grocery purchases, the Federal Reserve Bank of Boston estimates that the subsidy from low-income card users to better-heeled "rewards card" users totals between $1.4 billion and $1.9 billion each year.[22] The district court noted the unfair regressive nature of this transfer: "a lower-income shopper who pays [for] groceries with cash or through [electronic benefits transfer] . . . is subsidizing, for example, the cost of the premium rewards conferred by American Express on its relatively small, affluent cardholder base."[23]

Prohibiting merchants from being open about the costs of accepting different payment methods, and factoring those costs into their pricing, also makes it more difficult for consumers to factor those costs into their

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[21] *Amex I*, 88 F. Supp. 3d at 215-17.

[22] Scott Schuh et al., Federal Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations* 3 n.6 (2010), *available at* https://www.bostonfed.org/economic/ppdp/2010/ppdp1003.pdf.

[23] *Amex I*, 88 F. Supp. 3d at 216-17.

purchasing decisions.[24] The result is more use, of more expensive credit cards, than would otherwise occur. Uneconomical credit card use leads in turn to diminished consumer purchasing power, less saving, greater borrowing, more borrowing-related fees, and higher levels of indebtedness than would be present in a more efficient and competitive market.[25] Further still, merchant restraints heighten the barriers to entry for mobile electronic payment businesses and other would-be market participants, who could bring lower-cost options into the marketplace, by obscuring the true costs of credit cards, thereby neutralizing any cost advantages that new entrants could bring to bear in the marketplace.[26]

If Amex were unable to use its market leverage to impose these anticompetitive restrictions on merchants, merchants would be free to communicate with consumers about lower-cost payment methods and

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[24] *See* Steven Semeraro, *Assessing the Costs & Benefits of Credit Card Rewards: A Response to Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, 25 Loy. Consumer L. Rev. 30, 47-59 (2012); *see also Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 784-85 (1999) (Breyer, J., concurring in part and dissenting in part) ("To restrain truthful advertising about lower prices is likely to restrict competition in respect to price – 'the central nervous system of the economy.'") (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940)).

[25] William W. Shaw, A Question of Integrity, Credit Card Mgmt., Feb. 2005, at 48. In general, credit card reward programs encourage consumers to shift to more expensive payment methods.

[26] Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1386 (2008).

offer consumers incentives to use them. Amex would then be subject to competitive pressure to lower its merchant fees. Consumers would enjoy lower prices across the board, with the greatest benefits flowing to the lower end of the income spectrum, where consumers have to live on a budget. Unless the decision below is reversed, American consumers will continue to suffer from artificially elevated retail prices and hidden subsidization of costly high-end "reward" programs that ultimately benefit mostly Amex.

II. The Second Circuit's Opinion Fails to Accord the Requisite Deference to the District Court's Findings of Fact.

After a lengthy trial during which dozens of witnesses testified and a voluminous evidentiary record was developed, the district court found that the restraints Amex imposed on merchants spurred prices upward for *all* consumers and thwarted price competition among credit card companies.[27] The Second Circuit reached a somewhat different conclusion: that Amex's merchant restraints "protect[ ]" its merchant-fee revenue and thereby "affect competition[.]"[28] The Second Circuit also emphasized that disallowing merchant restraints could diminish "the optimal level of cardholder benefits, which in turn may reduce the intensity of competition among payment-card networks

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[27] *Amex I*, 88 F. Supp. 3d at 150-51.

[28] *Amex II*, 838 F.3d at 205.

on the cardholder side of the market."[29] In a footnote, the Second Circuit declared that the district court erred by failing to account for the cardholder benefits that many Amex customers enjoy.[30]

This assertion cannot be squared with the district court's findings of fact. The district court wrote that "[Amex] executed a series of targeted [merchant fee] increases . . . with the stated purpose of better aligning its prices with the value it perceived as being delivered to both cardholders and merchants[ ]" but failed to "pair [increased revenues from increased merchant fees] with offsetting adjustments on the cardholder side of the platform. . . ."[31] In other words, the district court found that Amex failed to even apportion the additional revenue from increased merchant fees to cardholder rewards.

Moreover, the fact that a select subset of consumers might receive benefits – the Amex cardholders' kickback "rewards" – does not justify the harm inflicted on consumers more broadly through the higher retail prices they pay as a result of the higher credit card fees merchants are forced to incur.

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[29] *Id.* It bears mentioning that there is no factual *or legal* basis for this claim. Procompetitive effects in one market cannot authorize anticompetitive restraints on trade in another market. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

[30] *Amex II*, 838 F.3d at 204 n.52.

[31] *Amex I*, 88 F. Supp. 3d at 195-96.

The Second Circuit's opinion fails to point to any contrary evidence in the record and does not otherwise attempt any explanation of why the district court's findings are "clearly erroneous." Indeed, the opinion does not account for these findings in any way. Compounding these errors is the footnote that contradicts – indeed, whitewashes – the district court's thorough examination of the record and detailed resultant finding on cardholder benefits.[32]

It may be true that a small number of relatively prosperous credit card holders benefit from Amex's efforts to isolate its high merchant fees from price competition, but the district court also found that *all consumers* were harmed by artificially inflated prices. Yet the Second Circuit's opinion fails to so much as acknowledge the district court's finding that merchant restraints drive up prices for consumers across the board. In so doing, the Second Circuit failed to show the appropriate deference to the district court's factual findings.[33]

The result is that the Second Circuit placed the arguable interest of credit card holders in reaping more cardholder rewards above the interest *all*

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[32] *Amex II*, 838 F.3d at 204 n.52.

[33] *Cf. Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.").

businesses have in meaningful competition with respect to credit card fees, not to mention the interests *all* consumers have in lower prices. Under this logic, a firm can substantially restrain horizontal competition in one market if it can show some possible procompetitive effect in another market – even if anticompetitive effects predominate in other markets as well. There is no basis in fact or law for this view.[34]

CONCLUSION

The decision below should be reversed to prevent a warped understanding of antitrust jurisprudence from spreading and to allay the harm to consumers

[34] *See supra* note 27.

bred by the suppression of price competition in the electronic payments market.

December 14, 2017

Respectfully submitted,

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